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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No. 71

FEDERAL POWER COMMISSION,
Petitioner

v.

EAST OHIO GAS COMPANY, ET AL,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ADOPTION BY RAILROAD COMMISSION OF TEXAS
OF AMICUS MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING FILED BY
THE NATIONAL ASSOCIATION OF RAILROAD
AND UTILITIES COMMISSIONERS

PRICE DANIEL
Attorney General of Texas

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Attorney General

Attorneys for Railroad Commission
of Texas

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1949

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AND UTILITIES COMMISSIONERS

TO THE HONORABLE, THE SUPREME COURT OF THE
UNITED STATES:

Comes now the Railroad Commission of Texas by and
through Price Daniel, Attorney General of Texas, and adopt

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1919

No. 11

FEDERAL POWER COMMISSION

Respondent

EAST OHIO GAS COMPANY, ET AL.

Petitioners

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ADOPTION BY RAILROAD COMMISSION OF THE
OF AMERICAN MESSAGE IN SUPPORT OF
PETITION FOR REHEARING FILED BY
THE NATIONAL ASSOCIATION OF RAILROAD
AND UTILITIES COMMISSIONERS

TO THE HONORABLE THE SUPREME COURT OF
UNITED STATES

Copies now in the Railroad Commission of Texas

Given by the Railroad Commission of Texas

as its own the Amicus Memorandum in support of the petition for rehearing filed by the National Association of Railroad and Utilities Commissioners in this cause.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

Charles D. Mathews

CHARLES D. MATHEWS
Executive Assistant
Attorney General

Dated February 8, 1950

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NO. 71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

FEDERAL POWER COMMISSION, Petitioner

v.

THE EAST OHIO GAS COMPANY, ET AL., Respondents

On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit

MEMORANDUM IN SUPPORT OF PETITIONS FOR RE-
HEARING SUBMITTED ON BEHALF OF THE NATIONAL
ASSOCIATION OF RAILROAD AND UTILITIES
COMMISSIONERS, AND CERTAIN STATE REGULA-
TORY COMMISSIONS. AMICI CURIAE.

WALLACE E. WARREN,
Attorney General

P. VA. SATTER,
Asst. Attorney General

RICHARD F. GALLAGHER,
Commerce Council,
Public Service Commission

State Capital,
Bismarck, North Dakota

Attorneys for the State of North
Dakota.

January 31, 1950.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 71.

FEDERAL POWER COMMISSION, *Petitioner*

V.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR RE-
HEARING SUBMITTED ON BEHALF OF THE NATIONAL
ASSOCIATION OF RAILROAD AND UTILITIES
COMMISSIONERS, AND CERTAIN STATE REGULA-
TORY COMMISSIONS, AMICI CURIAE.

To the Honorable Supreme Court of the United States:

Comes now the State of North Dakota, *Amicus Curiae*,
and presents this memorandum for consideration in the re-
quest that a rehearing be granted the respondents in the
above-entitled cause, which, in support thereof, the State of
North Dakota respectfully shows:

1. That the State of North Dakota since 1919, and prior thereto has had and now has a comprehensive body of law regulating public utilities including natural-gas companies.

That the State of North Dakota, through its Public Service Commission and predecessor agencies, has been active in regulating these Public Utilities and its power so to do has been on numerous occasions sustained by the Supreme Court of the State of North Dakota.

That under its regulatory laws governing public utilities, the State of North Dakota, has been successful in protecting the interests of the people of this State, and by such local control has been able to secure adequate and efficient service from the utilities operating in the State at a minimum of cost to the public.

2. The State of North Dakota is deeply concerned with the broad powers vested in the Federal Power Commission by the decision in this cause. We feel that the decision goes beyond the clearly expressed purpose of the law and will lead to further confusion in the administration of State laws, with the ultimate loss of all local and State control which, we feel, the law meant to preserve.

3. We feel that the Natural Gas Act intended that the jurisdiction of the Federal Power Commission should be predicated on the answers to the questions:

(1) Are the activities of the company to be regulated of national or of local importance, and (2) Is the company to be regulated a supplier (wholesaler) or a retailer (distributor)?

The majority opinion states:

" But prior constitutional decisions, not what we have since decided or would decide today, form

the measure of the gap which Congress intended to close by this Act." (citing)

"In a series of cases repeatedly called to the attention of the House Committee, this Court had declared that the states could regulate interstate gas only after it was reduced in pressure and entered a local distribution system. *Public Utilities Comm'n v. Landon*, 249 U.S. 236, 243; *Missouri v. Kansas Gas Co.*, 265 U.S. 298, 310; *Public Utilities Comm'n v. Attleboro Co.*, 273 U.S. 83, 89; and see *East Ohio Gas Co. v. Tax Comm'n.* 283 U. S. 465, 470-472. Under these decisions state regulatory power could not reach high-pressure trunk lines and sales for resale. This was the "gap" which Congress intended to close"

Examination of these "prior constitutional decisions" that "form the measure of the gap which Congress intended to close" indicates clearly that the activities of East Ohio are not included in that hiatus. In each case cited by the majority opinion, the question turned on whether the state was attempting to regulate the rate of a supplier (wholesaler) or whether the state was attempting to regulate the rate of a retailer (distributing company). If the rate was that of a supplier (wholesaler) it was held that the matter was of national concern and not of local concern, whereas if the rate was that of a retailer (distributing company) it was held that the matter was one of local concern and the state could exercise its regulatory powers. In none of the cases above cited did the question turn on whether the gas was moving in a "high-pressure trunk line" or had been stepped-down. On the contrary it held that no gap existed once the transfer was made from the supplier (wholesaler) to the retailer (local distributing company). As said by the court in the *Kansas Gas Case*, P. 308:

" With the delivery of the gas to the distributing companies, however, the interstate movement

ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation." (citing the Landon Case)

and further on page 309 it said:

" The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made *by the transporting company or by the independent distributing companies.*" In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." (Italics ours)

Briefly reviewing the four cases cited by the majority to indicate the gap that existed prior to the Act, shows that in the Landon case a supplier (wholesale) rate was in dispute and it was held that a state could not act; the Kansas Gas case involved a supplier's (wholesaler's) rate, the court held that gas was in interstate commerce up to the time it passed to the local distributing company, therefore the state could not regulate the wholesale rate; in the Attleboro case the Court held that a state could not regulate wholesale rates; the East Ohio Gas Co. v. Tax Comm's Case concerned a tax matter and no utility regulatory measure was involved.

4. We are concerned about the decision in this case, because, though presently it only requires East Ohio to conform to the Commission's system of accounts, still it is the natural inference, under the "pressure theory" applied by the majority, that the Federal Power Commission can set the rate on the gas moving through the distributing company's (East Ohio) high-pressure trunk lines to the city gates. The only

rate-making authority that would be left to the state would be within the limits of the various cities. Needless to say such a situation not only leads to further confusion but would make it well nigh impossible for a state to set up a uniform rate which is highly desirable from a local point of view.

If the Commission only desires that East Ohio set up its books in accordance with the Commission's rules so that the Commission examine them without asserting its rate making authority—then it is an expensive burden that the Commission seeks to have imposed upon the gas consumers in Ohio and the consumers in other states in which the commission seeks to assert a similar control.

Conclusion

It is respectfully urged that the petitions for rehearing be granted and that upon reconsideration the decree of the United States Court of Appeals for the District of Columbia Circuit be affirmed.

Respectfully submitted,

WALLACE E. WARNER,
Attorney General

P. O. SATHRE,
Ass't Attorney General

RICHARD P. GALLAGHER,
Commerce Counsel,
Public Service Commission

State Capitol
Bismarck, North Dakota

Attorneys for the State of North
Dakota.

Certificate of Counsel

We, the undersigned attorneys for the State of North Dakota, *amicus curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith and not for the purpose of delay.

WALLACE E. WARNER,
Attorney General

P. O. SATHRE,
Ass't Attorney General

RICHARD P. GALLAGHER,
Commerce Counsel,

Public Service Commission

State Capitol
Bismarck, North Dakota

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Dakota.**

MICRO

TRADE



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